REASONS FOR DENYING THE PETITION

Plaintiff Petitioner has failed to present any compelling reasons to grant his petition as required under Supreme Court Rule 10. The decisions below do not conflict with any decisions of this Court, or any Court of Appeals, nor do they decide an important federal question that has not been resolved by this Court. Instead, the Sixth Circuit affirmed the longstanding principle under Michigan law that once an issue has been resolved on the merits, it cannot be re-litigated against the same parties. *See, e.g., Reithmiller v. Blue Cross & Blue Shield of Mich.*, 824 F.2d 510, 511 (6th Cir. 1987); *see also, Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 482, n.22, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982) ("Res judicata has recently been taken to bar claims arising from the same transaction even if brought under different statutes . . ."). Accordingly, Respondent DaimlerChrysler Corporation respectfully requests that Plaintiff's Petition for Writ of Certiorari be denied.

A. Most of the Questions Presented for Review Are Not Properly Before the Court

Construed liberally, Plaintiff-Petitioner seeks review of issues decided by the 50th District Court, Oakland County Circuit Court, Michigan Court of Appeals, Michigan Supreme Court, Federal Judicial Council[2] and the United States District Court for the Eastern District of Michigan. These decisions by the lower courts may not be directly appealed to the United States Supreme Court on a petition for writ of certiorari. *See* Supreme Court Rule 10, 13.

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2. Respondent DaimlerChrysler was not a party to the challenges before the Judicial Council.

More importantly, Plaintiff-Petitioner's request for review of the Michigan Supreme Court's decision (as well as any decision of the lower courts in Michigan) is untimely. Under Supreme Court Rule 13, a petition for writ of certiorari is only timely when it is filed with the Supreme Court within 90 days after entry of the judgment or order denying discretionary review. The Michigan Supreme Court entered its Order denying leave to appeal on February 27, 2004. Plaintiff's Petition for Writ of Certiorari was not filed until almost 6 months later on August 23, 2005.[3] Accordingly, the Petition was not filed within 90 days after entry of the Michigan Supreme Court's order, and it is untimely.

B. No Compelling Reasons Exist for Granting the Petition for Writ of Certiorari

While Plaintiff is not happy with the result he received in the state courts, a mere unfavorable result is not subject to appeal in the federal courts, and there is clearly no compelling reason to grant Plaintiff's Petition for Writ of Certiorari. It is well-settled law that under res judicata, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or could have been raised in that action. *San Remo Hotel, L.P.* v. *City & County of San Francisco*, __ U.S. __, 125 S. Ct. 2491, 2500, n.16, 162 L. Ed. 2d 315 (2005) (citing *Allen* v. *McCurry*, 449 U.S. 90, 94-96, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)). Res judicata and collateral estoppel relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on adjudication. *Id.*

3. Plaintiff filed a petition for writ of certiorari on August 23, 2005. That petition was returned to petitioner to correct deficiencies. Plaintiff's corrected petition was docketed on October 4, 2005.

The Doctrine of Res Judicata bars a subsequent action between the same parties or their privies based upon the same claims or causes of action that were or could have been raised in a prior action and thereby is intended to avoid the relitigation of claims which have been previously decided by another tribunal. Federal courts are required to give the same preclusive effect to a previous state court judgment as such a judgment would receive in the courts of the rendering state. *See Migra* v. *Warren City Sch. Dist. Bd. Of Educ.*, 465 U.S. 75, 85, 104 S. Ct. 892, 79 L. Ed. 2d 56 (1984); *Dyer* v. *Intera Corp.*, 897 F.2d 1063, 1066 (6th Cir. 1989).

Michigan state courts have adopted a broad application of the Doctrine of Res Judicata, applying it to claims actually litigated, as well as claims which could have been brought in the first action. *See VanDeventer* v. *Michigan Nat'l Bank*, 172 Mich. App. 456, 464, 432 N.W.2d 338 (Mich. Ct. App. 1988). Even in instances where one suit is brought under state law and the other is brought under federal law, the Sixth Circuit has held that the two causes of action were "sufficiently identical to support application of Res Judicata to bar the second" suit. *Harris* v. *Ashley*, 165 F.3d 27 (6th Cir. 1998) (per curiam) (unpublished order).

A subsequent complaint is barred by Res Judicata if (1) the prior action was decided on its merits; (2) the issues raised in the second case either were resolved in the first, or through the exercise of reasonable diligence might have been resolved in the first case; and (3) both actions involved the same parties. *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 398, 101 S. Ct. 2424, 69 L. Ed. 2d 103 (1981); *Bittinger* v *Tecumseh Prods. Co.*, 123 F.3d 877, 880 (6th Cir. 1997); *Sloan* v. *Madison Heights*, 425 Mich. 288, 389 N.W. 2d 418 (Mich. 1986).

In this case, Plaintiff's prior state court action was dismissed on its merits pursuant to MCR 2.116(C)(10). In Michigan, a dismissal based upon MCR 2.116(C)(10) is an adjudication on the merits. *See Sherrell* v. *Buhgaski*, 169 Mich. App. 10, 17, 425 N.W. 2d 707 (Mich. Ct. App. 1988) ("[a] dismissal on motion by the defendants, after judicial consideration, as opposed to a ministerial procedural dismissal, is an adjudication on the merits"); *Wilson* v. *Knight-Ridder Newspapers, Inc.*, 190 Mich. App. 277, 279, 475 N.W.2d 388 (Mich. Ct. App. 1991) ("dismissal with prejudice . . . amounted to an adjudication of the merits and bars this action").

Moreover, the issues raised in Plaintiff's federal court "civil rights" complaint were resolved in his state court action. Plaintiff's federal court action is based upon the same alleged defamation during his employment search as Plaintiff's state court action which was previously litigated. Indeed, no new action by Defendants is alleged in Plaintiff's federal "civil rights" complaint. Additionally, the parties in Plaintiff's state court defamation action and his federal court "civil rights" action are identical. Simply stated, the Plaintiff has alleged the same claims arising out of the same facts against the same parties. Accordingly, res judicata applies, and Plaintiff's federal "civil rights" action was properly dismissed under Federal Rule of Civil Procedure 12(b)(6) and Federal Rule of Civil Procedure 56.[4]

Given this well-settled law, and the fact that Plaintiff has failed to show a compelling reason to grant his petition, there is simply no reason to revisit Plaintiff's claims that he

4. While Defendants filed their motion to dismiss under Fed. R. Civ. P. 12(b)(6), the district court treated it as a motion for summary judgment under Fed. R. Civ. P. 56.

has litigated through Michigan State courts or the judicial commission.[5]

CONCLUSION

For the foregoing reasons, Respondent, DaimlerChrysler Corporation, respectfully requests the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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5. Additionally, although not challenged by Plaintiff-Petitioner, the Sixth Circuit also properly noted that this "civil rights action" was not cognizable because the Defendants are not state actors for a 42 U.S.C. § 1983 claim, and Plaintiff failed to allege adequate facts or exhaust administrative remedies for a proper employment discrimination claim under federal law.

APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT FILED JULY 26, 2005

UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

No. 04-2155

BILL BUTLER,

Plaintiff Appellant,

v.

CHRYSLER CORPORATION; COMPUWARE CORPORATION, doing business as Professional Services,

Defendants-Appellees.

ORDER

Before: BATCHELDER, GIBBONS, and MCKEAGUE, Circuit Judges.

Bill Butler, a Michigan resident, appeals pro se a district court order dismissing a complaint he filed on the ground that it was barred by res judicata. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Butler filed this complaint, alleging that it was a "civil rights" action. According to the complaint, Butler was

employed by defendants as a mechanical engineer until his firing in 1998. Subsequently, when seeking new employment, he alleged that defendants told prospective employers that he had never worked there, thus preventing him from obtaining a new job.

Defendants moved for dismissal of the complaint, arguing that it was barred by res judicata because Butler had unsuccessfully pursued a defamation action in the Michigan state courts based on the same allegations. They submitted the decisions of the Michigan courts, which showed that they had been granted judgment because Butler provided no evidence that any prospective employer had failed to hire him based on defendants' refusal to acknowledge his employment. Butler pursued this case through the state court system to the Michigan Supreme Court.

This complaint was referred to a magistrate judge, who heard oral argument on the motion to dismiss and Butler's response. The magistrate judge's report and recommendation; after first stating that the motion to dismiss would be converted to a motion for summary judgment, recommended that the motion to dismiss be granted. The district court adopted this recommendation over Butler's objections. This appeal followed.

Initially, it is noted that, although Butler characterized this as a civil rights action, the named defendants could not be sued under 42 U.S.C. § 1983, as neither is a state actor. *Polk County v. Dodson,* 454 U.S. 312, 318-19 (1981). The complaint also contained no allegations of employment discrimination on the basis of Butler's membership in a

protected group, nor any indication that he had filed a charge with the B.E.O.C. and received a notice of the right to sue, in order to file a complaint of employment discrimination. *Puckett v. Tenn. Eastman Co.*, 889 F.2d 1481, 1486 (6th Cir. 1989).

Moreover, even construing the complaint liberally as a diversity defamation claim, it was properly found barred by res judicata. Whether defendants' motion was construed as one for dismissal or summary judgment, decisions relying on res judicata are reviewed de novo. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994). This complaint was barred by res judicata because Butler had filed a prior action which was decided on its merits, raising the same issue against the same defendants. *Reithmiller v. Blue Cross & Blue Shield of Mich.*, 824 F.2d 510, 511 (6th Cir. 1987). Although Butler does not believe that his claim was fairly addressed by the state courts, an appeal from an unfavorable result in state court is not available in federal district court. *Patmon v. Michigan Supreme Court*, 224 F.3d 504, 510 (6th Cir. 2000).

The district court's order is therefore affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER OF THE COURT

s/ [illegible]
Clerk

APPENDIX B — ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED AUGUST 27, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

Civil No. 04-71173
Hon. John Feikens

BILL BUTLER,

Plaintiff,

v.

DAIMLERCHRYSLER. CORP., and COMPUWARE CORP. d/b/a Professional Services,

Defendant.

ORDER ACCEPTING MAGISTRATE JUDGE'S REPORT AND RECOMMENDATION

The Court having reviewed the Magistrate Judge's Report and Recommendation, filed on **7/30/2004**, the Objections by Plaintiff filed on **8/11/2004**, and Defendant DaimlerChrysler's Response to the Objections filed on **8/11/2004**.

Appendix B

IT IS **ORDERED** that the Report and Recommendation is accepted and Defendants' Joint Motion to Dismiss is **GRANTED** and the case is **DISMISSED**.

s/ John Feikens
John Feikens
United States District Judge

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT EASTERN DISTRICT OF MICHIGAN, SOUTHERN DIVISION FILED JULY 30, 2004

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

CIVIL ACTION NO. 04 CV 71173 DT
DISTRICT JUDGE JOHN FEIKENS
MAGISTRATE JUDGE VIRGINIA M. MORGAN

BILL BUTLER,

Plaintiff,

v.

DAIMLERCHRYSLER CORP., and COMPUWARE CORP. d/b/a PROFESSIONAL SERVICES,

Defendants.

REPORT AND RECOMMENDATION

I. INTRODUCTION

Defendants DaimlerChrysler Corporation ("DaimlerChrysler") and Compuware Corporation d/b/a Professional Services ("Compuware") have filed this Joint Motion to Dismiss pursuant to Fed.R.Civ.P. 12 (b)(6). The

motion has been referred to this court. Oral argument was heard on June 28, 2004. Defendants argue that Plaintiff Bill Butler's claim is precluded by the doctrine of *res judicata,* based on prior judgments in state courts from the circuit, appellate, and supreme courts of Michigan. Plaintiff filed a response to Defendants' motion. Defendants filed "objections" to Plaintiffs response. For the reasons stated in this Report, it is recommended that the Motion be granted and the case dismissed.

II. BACKGROUND

Plaintiff has brought this suit alleging civil rights violations under 42 U.S.C. § 1983, specifically with regard to his employment history. Plaintiff had been in the employ of MIS International ("MIS"), a contract services agency. MIS was later purchased by Compuware and renamed "Professional Services." Plaintiff was placed at then-Chrysler Corporation[1] as a mechanical design engineer. MIS terminated Plaintiff in October 1998. Plaintiff subsequently began to search for new employment. Plaintiff claims, that while in that process, Defendants knowingly defamed Plaintiff and hindered his employment search by refusing to acknowledge his employment at either entity.

Plaintiff brought a defamation suit against both DaimlerChrysler and Compuware in Oakland County Circuit Court. On December 13, 2000, summary disposition was granted to Defendants with regard to Plaintiff's original

1. Daimler-Benz AG and Chrysler Corporation merged in 1998 to form DaimlerChrysler Corporation.

complaint, with leave to amend. Plaintiff did so amend and summary disposition was granted as to the amended complaint on April 29, 2002.

Plaintiff appealed as of right to the Michigan Court of Appeals. On December 4, 2003, the Court of Appeals affirmed the trial court stating, "A motion under MCR 2.116 (C)(10) (for summary disposition) tests the factual sufficiency of the complaint. . . . Plaintiff failed to provide evidence to support his claim." (Citation omitted). Plaintiff then petitioned the Michigan Supreme Court for immediate consideration and the application for leave to appeal the judgment of the Court of Appeals. On February 27, 2004, immediate consideration was granted and the application for leave to appeal was denied.

Failing to have succeeded on any of his claims in the Michigan courts, Plaintiff brought suit on March 30, 2004 in this federal court. Plaintiff alleges, without statutory reference, violation of his civil rights with respect to his employment history, claiming the aforementioned failure to properly report his employment history. On April 16, 2004, Defendants moved to dismiss pursuant to Fed.R.Civ.P. 12(b)(6) alleging that Plaintiff's federal suit is precluded by the doctrine of *res judicata*.

III. ANALYSIS

Defendants seek dismissal of the instant action based on Fed.R.Civ.P. 12 (b)(6), alleging Plaintiff has failed "to state a claim upon which relief can be granted," due to the

doctrine of *res judicata*. "If *res judicata* is raised as an affirmative defense . . . Rule 12(b) and Rule 12(c) both provide that the motion will be treated as one for summary judgment." Wright, Miller & Kane, *Federal Practice and Procedure: Civil 3d*, § 2735.3 (1998). Fed.R.Civ.P. 12(b) states:

> If, on a motion asserting the defense numbered (6) to dismiss for failure of the pleading to state a claim upon which relief can be granted, matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56, and all parties shall be given reasonable opportunity to present all material made pertinent to such a motion by Rule 56.

Federal Rule of Civil Procedure 56(b) states the right of the "party against whom a claim . . . is asserted" to move for summary judgment. Federal Rule of Civil Procedure 56(c) states:

> The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

Appendix C

The standard for showing such a required absence of any issue of material fact is set forth in Federal Rule of Civil Procedure 56(e):

> When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of the adverse party's pleading, but the adverse party's response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial.

The standard of showing such an absence of a "genuine issue of material fact" set forth above in Fed.R.Civ.P 56(e) has been summarized by the Sixth Circuit. *Haverstick Enterprises, Inc. v. Financial Federal Credit, Inc.*, 32 F.3d 989, 993 (6th Cir. 1994). The Court noted "On summary judgment motions, all reasonable inferences drawn from the evidence must be viewed in the light most favorable to the parties opposing the motion." *Haverstick Enterprises, Inc.*, at 993 citing *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587-88, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986), The Court also noted, "However, '[w]here the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *Id.* The Court further clarifies the standard, stating "Summary Judgment must be entered against a party who failed to provide sufficient evidence in support of an essential element of that party's case."

Haverstick Enterprises. Inc. at 993 citing *Celotex Corp. v. Catrett,* 477 U.S. 317, 322-323, 106 S.Ct. 2548, 2552, 91 L.Ed.2d. 265 (1986).

In determining whether a summary judgment motion can be granted to a party alleging *res judicata,* the Supreme Court has charted this route: "Under the doctrine of *res judicata, a* judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. *Parklane Hosiery Co. v. Shore,* 439 U.S. 322, 327, 99 S.Ct. 645, 649 (1979), citing J. Moore, *Federal Practice* ¶0.405[1], pp. 622-624 (2d ed. 1974). When, as in this action, the prior suit was adjudicated by the state courts and the related, succeeding case is a federal action, case law interpreting the Full Faith and Credit Clause of the Constitution must be followed. The codified language of the statute "reads in pertinent part:

> Such Acts, records and judicial proceedings or copies thereof, so authenticated, shall have the same full faith and credit in every court within the United States and its Territories and Possessions as they have by law or usage in the courts of such State, Territory, or Possession from which they are taken."

28 U.S.C. § 1738 quoted by *Migra v. Warren City School Dist. Bd. of Educ.,* 465 U.S. 75, 80, 104 S.Ct. 892, 896 (1984). "It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the

judgment was rendered." *Migra* at 81 citing *Allen v. McCurry*, 449 U.S. 90, 101 S.Ct. 411 (1980).

The Supreme Court has specifically addressed, however, the question of whether the law of *Allen* cited above by *Migra* is relevant to 42 U.S.C. § 1983 actions. *Migra* dealt with the question of whether the *Allen* rule was applicable to claims, specifically civil rights questions, where the Federal government is entrusted with the power to determine whether such state civil rights law is unconstitutional. "In *Allen*, the Court considered whether 42 U.S.C. § 1983 modified the operation of § 1738 so that a state-court judgment was to receive less than normal preclusive effect in a suit brought in federal court under § 1983." *Migra* at 81. The Court explained, "[n]othing in the language of § 1983 remotely expresses any congressional intent to contravene the common-law rules of preclusion or to repeal the express statutory requirements of the predecessor of 28 U.S.C. § 1738 . . ." *Migra* at 82 citing *Allen*, 449 U.S. at 97, 101 S.Ct., at 416. "*Allen* therefore made clear that issues actually litigated in a state-court proceeding are entitled to the same preclusive effect in a subsequent federal § 1983 suit as they enjoy in the courts of the State where the judgment was rendered." *Migra* at 83. While *Allen* ruled that issue preclusive effect can be given to state court judgments in § 1983 cases, *Migra* extended the rule to include the effect of claim preclusion as well. "[W]e must reject the view that § 1983 prevents the judgment in petitioner's state-court proceeding from creating a claim preclusion bar in this case." *Id.* at 84.

Appendix C

Migra also notes that a federal claim that could have been brought by a claimant in the prior state court suit is afforded the same preclusive effect as if it had been included. "Section 1983, however, does not override state preclusion law and guarantee petitioner a right to proceed to judgment in state court on her state claims and then turn to federal court for adjudication of her federal claims." *Id.* at 85.

Plaintiff did not specifically raise 42 U.S.C. § 1983 as the statute under which his claim is brought. However, Plaintiff explicitly states "his civil rights have been violated" as well as noting on the "Civil Cover" sheet "Federal Question" jurisdiction, with "Employment" selected under the "Civil Rights" category.

Since § 1983 claims have the same preclusive effect afforded other claims under 28 U.S.C. § 1738 under the rulings of *Allen* and *Migra*, Michigan's *res judicata* case law must be applied to the instant action. In Michigan, "[t]here are three prerequisites to the application of the *res judicata* doctrine: (1) there must have been a prior decision on the merits; (2) the issues must have been resolved in the first action, either because they were actually litigated or because they might have been presented in the first action; and (3) both actions must be between the same parties or their privies." *VanDeventer v. Michigan National Bank*, 432 N.W.2d 338, 342 (Mich. App. 1988) citing *Sloan v. Madison Heights*, 425 Mich. 288, 295, 389 N.W.2d 418 (1986). Defendant also notes in its brief the additional rule in *VanDeventer* that "Michigan courts apply the *res judicata* doctrine broadly so as to bar claims that were actually litigated as well as claims arising out of the same transaction

which a plaintiff could have brought, but did not." *VanDeventer* at 342 citing *Gose v. Monroe Auto Equipment Co.*, 409 Mich. 147, 160, 294 N.W.2d 165 (1980).

Applying the *Sloan* standard, there has been a "prior decision on the merits" in this matter. Plaintiff's first complaint was decided in Defendants' favor on a motion for summary disposition. The order was granted pursuant to MCR 2.116 (C)(10). MCR 2.116 (C)(10) states:

> (C) The motion may be based on one or more of these grounds, and must specify the grounds on which it is based:
>
> > (10) Except as to the amount of damages, there is not genuine issue as to any material fact, and the moving party is entitled to judgment or partial judgment as a matter of law.

In Michigan, "summary judgment is the procedural equivalent of a trial and is a judgment on the merits which bars relitigation on principles of *res judicata*." *Capital Mortg. Corp. v. Coopers & Lybrand*, 369 N.W.2d 922, 924 (Mich. App. 1985) citing *City of Detroit v. Nortown Theater, Inc.*, 323 N.W.2d 411, (Mich. App. 1982). As noted, the Michigan Court of Appeals affirmed the decision of the Oakland County Circuit Court on December 4, 2003. The Michigan Supreme Court denied leave to appeal on February 27, 2004.

The second prerequisite needed to apply the doctrine of *res judicata* has been satisfied as well. Plaintiff has brought

no allegations which were not litigated in the first action. The claim is based on the same facts and allegations, specifically the Defendant companies defamed Plaintiff during his employment search. While Plaintiff brings this claim under the auspices of a § 1983 claim separate from his state court defamation claim, it is well established that such an action is held to the same standard for claim preclusive purposes. *Migra, supra.* Plaintiff has alleged that one of the bases for his federal claim is that the Michigan state courts "in his case were incompetent." Plaintiff's usage of "incompetent," however, is incorrect and not a valid challenge to the court's competency. The "competency" of the proceedings refers not to the conduct of the court nor the outcome of the case nor Plaintiff's allegations of misconduct, but rather the appropriateness of the court's jurisdiction. Plaintiff also alleges "incompetency" of the court in relation to what could be perceived as Plaintiff's own errors, claiming certain depositions were not taken prior to the first action. This argument is also without merit.

Third, both the state court actions and instant federal claim are between the same parties, having the same Plaintiff and Defendants. Based on the doctrine of *res judicata,* all prerequisites for a bar to Plaintiff's federal claim have now been satisfied. Defendants' Motion pursuant to Fed.R.Civ.P. 12 (b)(6) should be granted.

IV. CONCLUSION

Accordingly, it is recommended that Defendants' Joint Motion to Dismiss be granted and the case be dismissed.

Appendix C

The parties to this action may object to and seek review of this Report and Recommendation, but are required to act within ten (10) days of service of a copy hereof as provided for in 28 U.S.C. § 636(b)(1) and E.D. Mich. LR 72.1(d)(2). Failure to file specific objections constitutes a waiver of any further right of appeal. *Thomas v. Arn*, 474 U.S. 140 (1985); *Howard v. Secretary of HHS*, 932 F.2d 505, 508 (6th Cir. 1991); *United States v. Walters*, 638 F.2d 947, 949-50 (6th Cir. 1981). The filing of objections which raise some issues, but fail to raise others with specificity, will not preserve all the objections a party might have to this Report and Recommendation. *Willis v. Secretary of HHS*, 931 F.2d 390, 401 (6th Cir. 1991); *Smith v. Detroit Fed'n of Teachers Local 231*, 829 F.2d 1370, 1373 (6th Cir. 1987). Pursuant to E.D. Mich. LR 72.1(d)(2), a copy of any objections is to be served upon this magistrate judge.

Within ten (10) days of service of any objecting party's timely filed objections, the opposing party may file a response. The response shall be no more than 20 pages in length unless, by motion and order, the page limit is extended by the court. The response shall address each issue contained within the objections specifically and in the same order raised.

s/ Virginia M. Morgan
VIRGINIA M. MORGAN
UNITED STATES MAGISTRATE JUDGE

Dated: July 30, 2004

APPENDIX D — MEMORANDUM OPINION OF THE STATE OF MICHIGAN COURT OF APPEALS DATED DECEMBER 4, 2003

STATE OF MICHIGAN
COURT OF APPEALS

UNPUBLISHED
December 4, 2003

No. 241413
Oakland Circuit Court
LC No. 00-022028-CL

BILL BUTLER,

Plaintiff-Appellant,

v

CHRYSLER CORPORATION and COMPUWARE CORPORATION, d/b/a PROFESSIONAL SERVICES,

Defendants-Appellees.

Before: Murray, P.J. and Gage and Kelly, JJ.

MEMORANDUM.

Plaintiff appeals as of right the order granting defendant's motion for summary disposition under MCR 2.116(C)(10). We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Appendix D

Plaintiff brought this defamation action based on defendants' failure to supply information about plaintiff's employment history to prospective employers. Plaintiff asserted that when prospective employers checked his employment history, defendants denied that plaintiff ever worked for them. Plaintiff claimed that this denial constituted defamation that deprived him of employment.

A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. In evaluating the motion, the trial court considers affidavits, pleadings, depositions, admissions and other evidence submitted by the parties in a light most favorable to the party opposing the motion. Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. *Maiden v Rozwood,* 461 Mich 109, 120; 597 NW2d 817 (1999).

Plaintiff failed to provide evidence to support his claim. Plaintiff asserted that potential employers contacted defendants, and were told that there was no record of plaintiff's employment. Yet, the official of the only potential employer identified by plaintiff indicated that she did not make any contact with defendants. Challenging the official's credibility does not create admissible evidence in support of plaintiff's claim. The trial court properly granted defendants' motion.

Affirmed.

s/ Christopher M. Murray
/s/ Hilda R. Gage
/s/ Kirsten Frank Kelly

APPENDIX E — OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION OF THE STATE OF MICHIGAN IN THE CIRCUIT COURT FOR THE COUNTY OF OAKLAND DATED APRIL 29, 2002

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE
COUNTY OF OAKLAND

No. 00 022028 CL

BILL BUTLER,

Plaintiff,

-v-

CHRYSLER CORPORATION and COMPUWARE CORPORATION, d/b/a PROFESSIONAL SERVICES,

Defendants.

OPINION AND ORDER REGARDING DEFENDANTS' MOTIONS FOR SUMMARY DISPOSITION

At a session of said Court held in the Courthouse in the City of Pontiac, County of Oakland, and State of Michigan on April 29, 2002.

Appendix E

PRESENT: HONORABLE RICHARD D. EDEN, CIRCUIT JUDGE

This matter is before the Court on Defendant DaimlerChrysler's Motion to Enforce Order Granting its Motion for Summary Disposition and Defendant Compuware Corporation's Motion for Summary Disposition. The Court hoard oral argument and took the motions under advisement.

This is an action for defamation. Plaintiff was a contract employee of MIS International, later purchased by Compuware, and was assigned to work for Chrysler, now DaimlerChrysler. Chrysler terminated Plaintiff, and he began to search for new employment. Plaintiff alleges that Defendants falsely informed his potential employers that he never worked for them.

On December 13, 2000, this Court granted DaimlerChrysler's Motion for Summary Disposition as to Plaintiff's original Complaint, pursuant to MCR 2.116(C)(8), but granted Plaintiff leave to amend the Complaint. Plaintiff did so.

DaimlerChrysler now moves for summary disposition as to Plaintiff's Second Amended Complaint, again pursuant to NCR 2.116(C)(8). "A motion for summary disposition under NCR 2.116(C)(8) tests the legal sufficiency of a claim to determine whether the opposing party's pleadings allege a prima facie case." *Wortelboer v Benzie Co,* 212 Mich App 208, 217 (1955). All well-pleaded factual allegations are accepted as true. The motion should be granted only where the claim, based on the pleadings alone, is so clearly

unenforceable as a matter of law that no factual development could possibly justify a right to recovery. *Paul v Bogle*, 193 Mich App 479, 495-496 (1992).

This Court granted summary disposition previously because the Complaint did not allege that Chrysler ever had a record of the plaintiff's employment by MIS at its facility. In the Second Amended Complaint, Plaintiff added allegations that Chrysler issued him a badge and corporate clearance, and that Plaintiff' s Chrysler supervisor evaluated Plaintiff's performance at Chrysler on a Chrysler Corporation form. This would be evidence that Chrysler knew Plaintiff worked at its facility. Reckless disregard of the truth might be inferred from the fact that Chrysler subsequently told others he never worked there. Therefore, Chrysler is not entitled to summary disposition pursuant to MCR 2.116(C)(8).

Defendant Compuware moves for summary disposition pursuant to MCR 2.116(C)(10). DaimlerChrysler joined in the motion. A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood,* 461 Mich 109; 597 NW2d 817 (1999).

> In reviewing a motion for summary disposition brought under MCR 2.116 (C) (10) , a trial court considers affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion. A trial court may grant a motion for summary disposition under MCR

2.116(C)(10) if the affidavits or other documentary evidence show that there is no genuine issue in respect to any material fact, and the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10).

In presenting a motion for summary disposition, the moving party has the initial burden of supporting its position by affidavits, deposition, admissions, or other documentary evidence. *Naubacher v Gobe Furniture Rentals,* 205 Mich App 418, 420, 522 NW2d 335 (1994). The burden then shifts to the opposing party to establish that a genuine issue of disputed fact exists. *Id.* Where the burden of proof at trial on a dispositive issue rests on a nonmoving party, the nonmoving party may not rely on mere allegations or denials in pleadings, but must go beyond the pleadings to set forth specific facts showing that a genuine issue of material fact exists. *McCart v J Walter Thompson,* 437 Mich 109, 115, 459 NW2d 284 (1991). If the opposing party fails to present documentary evidence establishing the existence of a material factual dispute, the notion is properly granted. *McCormick v Auto Club Ins Ass'n*, 202 Mich App 233, 237; 507 NW2d 741 (1993).

Smith v Globe Life Insurance Company, 460 Mich 446; 597 NW2d 28 (1999), quoting *Quinto v Cross & Peters Co*, 451 Mich 358, 362-363, 547 NW2d 314 (1996).

Appendix E

In his Second Amended Complaint, Plaintiff alleged that he applied at Combustion Components, Inc., and "learned from one Barbara _____ the interviewer, that both Chrysler Corporation and MIS International denied plaintiff ever worked for their company." In support of its motion, Compuware submitted the deposition transcript of Barbara Hurley. She interviewed Plaintiff in Connecticut for the position with Combustion Components, Inc. At her deposition, she testified that she never talked to anyone at MIS, Compuware or Chrysler about Plaintiff's employment history. In response to the question, "Did you ever call up Mr. Butler and ask him and make a statement that, "Your Ford reference looks good, but what happened at Chrysler?", *she stated,* "I don't recall that, no."

In response to the motion, Plaintiff submitted the long distance telephone records for the Connecticut company. Plaintiff claims the records show a call to Chrysler. DaimlerChrysler acknowledged that Plaintiff did show that a telephone call was placed to Chrysler. However, there is no proof that Ms. Hurley spoke to anyone, or what the content of any conversation tray have been.

Plaintiff may not rely on his allegation in the Second Amended Complaint, that he "learned from one Barbara _____ the interviewer, that both Chrysler Corporation and MIS International denied plaintiff ever worked for their company", to raise a fact issue about the existence of the allegedly defamatory statement, because in a summary disposition motion under subrule (C) (10), a non-moving party may not rely on mere allegations in pleadings.

Appendix E

Plaintiff also submitted a letter from a private investigator he hired, stating that the private investigator called MIS, Compuware and Chrysler, and that all three stated they had no record of employment for a person with Plaintiff's name and social security. However, even assuming that this letter is admissible, it does not support Plaintiff's allegation that the defendant companies reported such information to his prospective employers. The same is true of a newspaper article submitted by the Plaintiff, where a staff writer states that calls by her newspaper yielded similar results to those of the investigator's.

For all of the above reasons, both Chrysler and Compuware are entitled to summary disposition pursuant to MCR 2.116(C) (10) .

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Chrysler's Motion for Summary Disposition pursuant to MCR 2.116(C)(8) is denied.

IT IS FURTHER ORDERED AND ADJUDGED that Compuware and Chrysler's Motion for Summary Disposition pursuant to MCR 2.116(C)(10) is granted.

IT IS FURTHER ORDERED AND ADJUDGED pursuant to MCR 2.602(A)(3) that this Opinion and Order resolves the last pending claims and closes the case.

RICHARD D. KUHN
RICHARD D. KUHN, CIRCUIT JUDGE

No. 05-430

NOV 2 - 2005

In The

Supreme Court of the United States

BILL BUTLER,

Petitioner,

v.

DAIMLER CHRYSLER CORPORATION and COMPUWARE CORPORATION, d/b/a PROFESSIONAL SERVICES,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

Has the Petitioner shown any compelling reason for review by this Court, where his claims have been fully considered, and rejected, by the Michigan trial courts, the Michigan Court of Appeals, the Michigan Supreme Court, the United States District Court for the Eastern District of Michigan and the United States Court of Appeals for the Sixth Circuit?

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ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT DATED JULY 28, 2005 ..... App. 1

COUNTERSTATEMENT OF THE CASE

Petitioner filed a defamation action in the Oakland County Circuit Court, Case No. 00-022028-CL, asserting that Respondents gave false information to a prospective employer concerning his alleged prior employment with Respondents. Unfortunately for Petitioner, the prospective employer testified that it never contacted either of the Respondents to verify employment; instead, it selected another candidate who had previously worked for the company. After allowing Petitioner to amend his Complaint and providing him ample opportunity to articulate a claim, if he had one, the action was finally dismissed by the Oakland County Circuit Court on April 29, 2002.

Petitioner appealed as of right to the Michigan Court of Appeals. That appeal was denied on December 4, 2003. Petitioner then sought relief from the Michigan Supreme Court, which granted his request for immediate consideration, and denied his appeal on February 27, 2004. Presumably the reason the Michigan Supreme Court granted immediate consideration was because the Court was convinced there was no merit to the appeal and it could be readily addressed and dismissed.

Petitioner then sought to assert the very same claims in the United States District Court for the Eastern District of Michigan. A joint Motion to Dismiss was filed by Respondents. Following oral argument, where Petitioner was given an opportunity to present whatever facts and/or law he had to support his alleged position, Magistrate Judge Virginia M. Morgan issued her Report and Recommendation on July 30, 2004. The Magistrate concluded that the action should be dismissed, as Petitioner had had a full opportunity to litigate his claims in the state courts and

there was no legitimate claim he could assert against the Respondents. Petitioner filed Objections to these recommendations, which were considered by U.S. District Judge John Feikens, and rejected. A final order was issued by the court on August 27, 2004.

Petitioner subsequently appealed to the United States Court of Appeals for the Sixth Circuit. Evidently, Petitioner also asserted judicial misconduct claims against Judge Feikens and Magistrate Judge Virginia M. Morgan, for their failure to address, in writing, each specious argument he raised in oral argument. These claims were considered by the Judical Council for the Sixth Circuit and were properly dismissed. These claims are not properly raised before this Court.

Petitioner asserts that he did not get a full and fair opportunity to litigate his claims because both the state and federal courts rejected his arguments. However, Petitioner's disagreement with the decisions of the courts do not create a cause of action. Rather, it is clear that Petitioner's claims are fatally flawed, and must be rejected by the Court.

In reproducing the documents included in Petitioner's Appendix, there were numerous typographical errors, including missing sections of text. Therefore, the Order issued by the United States Court of Appeals for the Sixth Circuit is reproduced in its entirety in this response. Respondent reserves its objections to the numerous errors contained in the remaining documents.

ARGUMENT

This litigation has already spanned more than five (5) years. Having failed before the state trial courts, the Michigan Court of Appeals, the Michigan Supreme Court, the U.S. District Court for the Eastern District of Michigan and the Sixth Circuit, Petitioner now seeks further review of his claims. By application of the doctrine of *res judicata*, this Court is bound by the decisions of the Michigan courts, which fully considered Petitioner's claims and evidence and found that there are no genuine issues of fact and Respondents were entitled to judgment as a matter of law. Likewise, the U.S. District Court considered his arguments, and rejected them, finding that Petitioner's claims were precluded by *res judicata*. Petitioner's attempted reliance on "collateral estoppel" is misplaced; he does not understand that this legal theory is an affirmative defense, which requires that the Court apply the decision already made on the merits of this case. The unfortunate truth for the Petitioner is that the Respondents have done nothing to cause him harm, and he can articulate no legitimate claim against Respondent Compuware.

Petitioner's lack of understanding of the legal theories he is attempting to employ has required repeated responses from Respondents. Having lost all claims in the state courts, from the trial court all the way to the Michigan Supreme Court, the Federal district court and the Sixth Circuit he now seeks one last "bite at the apple" in this court. There is nothing left of that apple.

There is no question that it is time for this litigation to be concluded, once and for all. In support of its Argument, Respondent relies on the previous decisions issued

by the Oakland County Circuit Court, the Michigan Court of Appeals, the Michigan Supreme Court, the Report and Recommendations of Magistrate Judge Virginia M. Morgan, the Order Accepting Magistrate Judge's Report and Recommendation, and the Order of the United States Court of Appeal for the Sixth Circuit, all of which are part of the record in this matter.

CONCLUSION AND RELIEF

For all of the reasons stated above and in the Court's record, Respondent respectfully requests that this Court deny the Petition and bring this litigation to an end.

Respectfully submitted,

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Dated: November 2, 2005

No. 04-2155

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BILL BUTLER, Plaintiff-Appellant, v. CHRYSLER CORPORATION; COMPUWARE CORPORATION, doing business as Professional Services, Defendants-Appellees.	)	ORDER

Before: BATCHELDER, GIBBONS and MCKEAGUE, Circuit Judges.

Bill Butler, a Michigan resident, appeals pro se a district court order dismissing a complaint he filed on the ground that it was barred by res judicata. This case has been referred to a panel of the court pursuant to Rule 34(j)(1), Rules of the Sixth Circuit. Upon examination, this panel unanimously agrees that oral argument is not needed. Fed. R. App. P. 34(a).

Butler filed this complaint, alleging that it was a "civil rights" action. According to the complaint, Butler was employed by defendants as a mechanical engineer until his firing in 1998. Subsequently, when seeking new employment, he alleged that defendants told prospective employers that he had never worked there, thus preventing him from obtaining a new job.

Defendants moved for dismissal of the complaint, arguing that it was barred by res judicata because Butler

had unsuccessfully pursued a defamation action in the Michigan state courts based on the same allegations. They submitted the decisions of the Michigan courts, which showed that they had been granted judgment because Butler provided no evidence that any prospective employer had failed to hire him based on defendants' refusal to acknowledge his employment. Butler pursued this case through the state court system to the Michigan Supreme Court.

This complaint was referred to a magistrate judge, who heard oral argument on the motion to dismiss and Butler's response. The magistrate judge's report and recommendation, after first stating that the motion to dismiss would be converted to a motion for summary judgment, recommended that the motion to dismiss be granted. The district court adopted this recommendation over Butler's objections. This appeal followed.

Initially, it is noted that, although Butler characterized this as a civil rights action, the named defendants could not be sued under 42 U.S.C. § 1983, as neither is a state actor. *Polk County v Dodson*, 454 U.S. 312, 318-19 (1981). The complaint also contained no allegations of employment discrimination on the basis of Butler's membership in a protected group, nor any indication that he had filed a charge with the E.E.O.C. and received a notice of the right to sue, in order to file a complaint of employment discrimination. *Puckett v. Tenn. Eastman Co.*, 889 F.2d 1481, 1486 (6th Cir. 1989).

Moreover, even construing the complaint liberally as a diversity defamation claim, it was properly found barred by res judicata. Whether defendants' motion was construed as one for dismissal or summary judgment, decisions relying

on res judicata are reviewed de novo. *Black v. Ryder/P.I.E. Nationwide, Inc.*, 15 F.3d 573, 582 (6th Cir. 1994). This complaint was barred by res judicata because Butler had filed a prior action which was decided on its merits, raising the same issue against the same defendants. *Reithmiller v. Blue Cross & Blue Shield of Mich.*, 824 F.2d 510, 511 (6th Cir. 1987). Although Butler does not believe that his claim was fairly addressed by the state courts, an appeal from an unfavorable result in state court is not available in federal district court. *Patmon v. Michigan Supreme Court*, 224 F.3d 504, 510 (6th Cir. 2000).

The district court's order is therefore affirmed. Rule 34(j)(2)(C), Rules of the Sixth Circuit.

ENTERED BY ORDER
OF THE COURT

/s/
Clerk